82-1170

Office - Supreme Court, U.S.
FILED
DEC 30 1982
ALEXANDER L. STEVAS,
CLERK

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

VICTOR MANUEL STUART-CABALLERO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DONALD I. BIERMAN, Esquire
Counsel of Record
BENEDICT P. KUEHNE, Esquire

BIERMAN, SONNETT, BEILEY,
SHOHAT & SALE, P.A.
Suite 500
200 S.E. First Street
Miami, Florida 33131
(305) 358-7477

Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Contraband on the High Seas Act, 21 U.S.C. §955a, is unconstitutional where the statute attempts to impose strict liability on the possession of large amounts of marijuana by omitting the elements of knowing and intentional possession of a controlled substance?

2. Whether the decision below affirming Petitioner's conviction is contrary to prevailing law and results in a deprivation of constitutional rights, where the evidence did not establish his knowing and voluntary possession of marijuana and further failed to establish the nationality of the vessel on which Petitioner and the marijuana were located?

LIST OF INTERESTED PERSONS

The only persons having an interest in the outcome of this case are the Petitioner, his family, and the United States of America.

TABLE OF CONTENTS

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 6

REASONS FOR GRANTING THE WRIT 11

I. The Contraband On The High Seas Act, 21 U.S.C. §955a, Is Unconstitutional Inasmuch As The Statute Attempts To Impose Strict Liability For The Possession Of Large Amounts Of Marijuana By Omitting The Elements Of Knowing And Intentional Possession Of The Contraband. 11

II. The Decision Below Affirming Petitioner's Conviction Is Contrary To Prevailing Law And Results In A Deprivation Of Constitutional Rights, Where The Evidence Did Not Establish His Knowing And Voluntary Possession Of Marijuana And Further Failed To Establish The Nationality Of The Vessel On Which Petitioner And The Marijuana Were Located. 15

CONCLUSION 25

CERTIFICATE OF SERVICE 26

APPENDIX 28

TABLE OF AUTHORITIES

Page

In Re Winship,
397 U.S. 358, 90 S.Ct. 1068 (1970)..16

Jackson v. Virginia,
443 U.S. 307, 99 S.Ct. 2781 (1979)..16

United States v. Bland,
653 F.2d 989 (5th Cir. 1981).....18

United States v. DeSimone,
600 F.2d 532 (5th Cir. 1981).....19

United States v. Edwards,
602 F.2d 458 (1st Cir. 1979).....14

United States v. Freeman,
660 F.2d 1030 (5th Cir. 1981).....21

United States v. Jackson,
572 F.2d 636 (7th Cir. 1978).....19

United States v. Jackson,
588 F.2d 1046 (5th Cir. 1979).....14

United States v. Littrell,
574 F.2d 828 (5th Cir. 1978).....18

United States v. Macker,
608 F.2d 223 (5th Cir. 1979).....18

United States v. McPherson,
664 F.2d 69 (5th Cir. 1981).....21

United States v. Morales,
577 F.2d 769 (2d Cir. 1978).....14

United States v. Platenburg,
657 F.2d 797 (5th Cir. 1981)....24, 25

United States v. Reyes,
595 F.2d 275 (5th Cir. 1979).....21

United States v. Shelnut,
625 F.2d 59 (5th Cir. 1980).....14

United States v. Stuart-Caballero,
686 F.2d 890 (11th Cir. 1982).....2

United States v. Willis,
639 F.2d 1335 (5th Cir.), reh.
denied, 646 F.2d 189 (1981).....18, 20

18 U.S.C. §2 6

21 U.S.C. §841 14

21 U.S.C. §955a 6, 11, 13, 14

Commentary of Mark Aron, Acting
General Counsel of Secretary of
Transportation, April 20, 1979,
21 U.S.C. §955a 12

Senate Report No. 96-855, 1980
U.S. Code Cong. and Admin.
News 5213 11

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

VICTOR MANUEL STUART-CABALLERO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petitioner, VICTOR MANUEL STUART-CABALLERO, respectfully prays that a Writ of Certiorari issue to review the judgment, opinion, and order of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on September 24, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals is reproduced in the Appendix attached hereto and is reported as United States v. Stuart-Caballero, 686 F.2d 890 (11th Cir. 1982). A copy of the order of the District Court denying the defense motion to dismiss is also contained in the Appendix.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment V:

> No person... shall be deprived of life, liberty, or property without due process of law...

Title 21 U.S.C. §955a:

> (a) It is unlawful for any person on board a vessel of

the United States, or on board a vessel subject to the jurisdiction of the United States on the high seas, to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.

* * *

(g)(1) Any person who commits an offense defined in subsection (a), (b), (c) or (d) of this section shall be punished in accordance with the penalties set forth in section 960 of this title.

(2) Notwithstanding paragraph (1) of this subsection, any person convicted of an offense under sections 955a to 955d of this title shall be punished in accordance with the penalties set forth in section 962 of this title if such offense is a second or subsequent offense as defined in section 962(b) of this title.

* * *

(h) This section is intended to reach acts of possession, manufacture, or distribution committed outside the territorial juris-

diction of the United States.

Title 21 U.S.C. §955b:

As used in sections 955a to 955d of this title --

(a) "Customs waters" means those waters as defined in section 1401(j) of Title 19.

(b) "High seas" means all waters beyond the territorial seas of the United States and beyond the territorial seas of any foreign nation.

(c) "Vessel of the United States" means any vessel documented under the laws of the United States, or numbered as provided by the Federal Boat Safety Act of 1971, as amended, or owned in whole or in part by the United States or a citizen of the United States, or a corporation created under the laws of the United States, or any State, Territory, District, Commonwealth, or possession thereof, unless the vessel has been granted nationality by a foreign nation in accordance with article 5 of the Convention on the High Seas, 1958.

(d) "Vessel subject to the jurisdiction of the United States" includes a vessel without nationality or a vessel assimilated to a vessel without nationality, in accordance with paragraph (2) of article 6 of the Convention on the High Seas, 1958.

(e) "Comprehensive Act" means the Comprehensive Drug Abuse Control and Prevention Act of 1970. All terms used in sections 955a to 955d of this title that are defined in the Comprehensive Act have the meanings assigned to them by that Act.

STATEMENT OF THE CASE

Petitioner, VICTOR MANUEL STUART-CABALLERO, and two others were charged by a federal grand jury in the Southern District of Florida with possession with intent to distribute marijuana while on board a United States vessel, in violation of 21 U.S.C. §955a(a) and 18 U.S.C. §2. At the conclusion of a jury trial, all defendants were convicted. STUART-CABALLERO received a five-year term of incarceration to be followed by a five-year special parole term.

On October 8, 1980, at approximately 8:00 P.M., the United States Coast Guard cutter POINT FRANCIS was on patrol in international waters near the Bahamas.[1/] In command of the vessel was

---

1/ This location was 120 miles from the coast of the United States.

Lt. Kim Krzywicki. At a point approximately ten miles northwest of Dog Rocks off the northeastern tip of Cay Sal Banks, the POINT FRANCIS sighted a vessel which, when illuminated by a spotlight from the Coast Guard cutter, was identified as the THOMAS E. from Norfolk, Virginia. The THOMAS E. was hailed and ordered to prepare for a Coast Guard boarding.2/ The weather that night was dark and rainy, and the seas were choppy.

Immediately upon utilizing the loud-hailer to direct the THOMAS E. to stop, the Coast Guard crew observed the pilothouse door of the THOMAS E. open while three unidentified individuals walked out to the deck. The three then

---

2/ The THOMAS E. was described by Lt. Krzywicki as a lobster boat common to that area. Nothing unusual was noticed about the THOMAS E. prior to ordering the boarding.

reentered the cabin. Within seconds, lights of the THOMAS E. were extinguished as the vessel increased its speed and changed course.[3/] Then began a nine hour chase through international waters, during which time the POINT FRANCIS used its flashing blue light, siren, ship's whistle, loud-hailer, and radio in an unsuccessful effort to force the THOMAS E. to stop. During the chase, Lt. Krzywicki observed an unidentified brown grassy substance in the wake of the THOMAS E. It was not unusual, however, to observe similar looking substances in the water.

The vessel was eventually disabled with gunshots fired from the Coast Guard cutter at a distance about 17 miles from Cuban shores. Throughout

---

3/ The THOMAS E. had not stopped when the three persons exited the pilothouse.

the initial observation and chase, the only violation observed by the Coast Guard was the THOMAS E. running without lights. This offense ordinarily results in the giving of a ticket to the vessel's operator.

As a boarding party pulled alongside the lobster boat, two Coast Guard officers smelled the odor of marijuana. During a search of the boat, the officers discovered bales of marijuana in the engine room and cargo holds. The three individuals found on board were arrested and transported to Miami, Florida. None of these persons were ever observed in the marijuana-laden areas of the vessel nor in possession of the contraband. At Miami, it was determined that the THOMAS E. was registered to Jorge Velazquez.

During the Coast Guard chase, the law enforcement officers on board

the cutter were of the opinion that a fourth man was on the THOMAS E., although only three persons were found at the time of boarding. This was consistent with the testimony of Ortega, who related at trial that he had been hired by Jorge Velazquez to travel on the THOMAS E. from Miami to the Bahamas to retrieve a boat seized by authorities for having unlawfully fished in Bahamian waters. Velazquez operated the boat; Ortega and the others on board, STUART-CABALLERO and Arias, slept in the pilothouse cabin. Ortega was unaware that the vessel carried marijuana until the Coast Guard chase, when Velazquez revealed the fact. It was during the chase that Velazquez abandoned the THOMAS E. by going overboard in a zodiac inflatable boat near Cuban waters.

REASONS FOR GRANTING THE WRIT

I. THE CONTRABAND ON THE HIGH SEAS ACT, 21 U.S.C. §955a, IS UNCONSTITUTIONAL INASMUCH AS THE STATUTE ATTEMPTS TO IMPOSE STRICT LIABILITY FOR THE POSSESSION OF LARGE AMOUNTS OF MARIJUANA BY OMITTING THE ELEMENTS OF KNOWING AND INTENTIONAL POSSESSION OF A CONTROLLED SUBSTANCE.

The "Contraband on the High Seas Statute" -- 21 U.S.C. §955a -- was enacted in order to facilitate enforcement by the Coast Guard of the laws relating to the importation of illegal controlled substances. Senate Report No. 96-855, 1980 U.S. Code Cong. and Admin. News 5213. Through enactment of this law, Congress sought to regulate only acts which involve the importation of contraband and not mere possession on board a vessel in international waters.

In keeping with that intention, Congress recognized that its authority would be limited by principles of international law:

> Because the conduct we are attempting to regulate takes place beyond our territorial limits, international law consideration require some nexus to the United States before we can apply our statutes.

Commentary of Mark Aron, Acting General Counsel of Secretary of Transportation, April 20, 1979, 21 U.S.C. §955a. Yet, notwithstanding this respect for principles of international law, Congress has disregarded our own principles of jurisprudence in enacting a statute which does not require the essential element of knowledge. This defect, while serious by itself, is indicative of the prevalent lack of respect for our Constitution which seems to accompany legislative responses to the drug

problem. We submit that it is incumbent on this Court to correct this injustice.

The Act under review violates due process by attempting to impose strict liability for possession of large amounts of contraband without a showing of knowing and voluntary possession. As written, §955a prohibits the knowing and intentional manufacture or distribution of a controlled substance, but requires no scienter in cases of possession of contraband. The "knowingly or intelligently" language of the Act refers only to the manufacture or distribution and not the possession of a controlled substance.

There is absolutely no doubt that proof of unlawful knowledge or intent has always been deemed an indispensible element to narcotics possession offenses. For example, similar statutes

proscribing the possession of contraband, e.g., 21 U.S.C. §841, are not valid without the mandatory element of scienter. United States v. Edwards, 602 F.2d 458, 470 (1st Cir. 1979); United States v. Jackson, 588 F.2d 1046, 1056-1057 (5th Cir. 1979); United States v. Morales, 577 F.2d 769 (2d Cir. 1978). Because §955a contains no similar element, a person could be subject to prosecution and conviction if that person were merely present on board a seagoing vessel loaded with contraband for distribution without ever knowing that controlled substances were on board. This situation exists because the statutory element of intent to distribute, which is the only state of mind in the congressional language, is deemed to exist simply by the presence of a large amount of contraband. E.g., United States v. Shelnut, 625 F.2d 59

(5th Cir. 1980).

By enacting a strict liability statute for an offense which has never been recognized as a malum in se crime, Congress has seriously departed from long standing jurisprudential concepts that persons are not to be punished criminally without some intentional or purposeful conduct on their part. This Court ought to take this opportunity to correct this serious defect by granting certiorari review of this case and the statute at issue. By giving de facto guidance to Congress, this Court will protect individual liberties and at the same time promote reasoned and effective law enforcement.

II. THE DECISION BELOW AFFIRMING PETITIONER'S CONVICTION IS CONTRARY TO PREVAILING LAW AND RESULTS IN A DEPRIVATION OF CONSTITUTIONAL RIGHTS, WHERE THE EVI-

DENCE DID NOT ESTABLISH HIS KNOWING AND VOLUNTARY POSSESSION OF MARIJUANA AND FURTHER FAILED TO ESTABLISH THE NATIONALITY OF THE VESSEL ON WHICH PETITIONER AND THE MARIJUANA WERE LOCATED.

In all criminal cases, the government has the responsibility of proving every element of the crime charged beyond a reasonable doubt. In Re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970). This burden is not dependent upon the status of the prosecuting authority, Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979) (due process requires same standard of proof in state criminal proceedings), or the status of the defendant. In Re Winship, supra, (beyond a reasonable doubt burden is applicable in adult and juvenile prosecutions). Yet, in the present case the Eleventh Circuit has imposed an altogether new standard of criminal respon-

sibility in situations involving mere transporters of contraband under conditions which amount to nothing more than ignorant involvement.

It is submitted that this emerging standard is completely erroneous and contrary to well established notions of criminal culpability. The conclusion of the appellate court ought to be reviewed for the very simple reason that, if upheld, this standard will impose criminal liability upon every individual who, without being cognizant of any illegal dealings, finds himself unknowingly immersed in the outer fringes of the drug trade.

In this case, as the appellate record and the affirmance opinion demonstrate, Petitioner was a crew member of a marijuana-laden lobster boat. He was never observed in actual possession of contraband; therefore, any constructive

possession that he may have had can only be established by proof that he knowingly exercised dominion and control over the marijuana. United States v. Willis, 639 F.2d 1335 (5th Cir.), reh. denied, 646 F.2d 189 (1981); United States v. Littrell, 574 F.2d 828 (5th Cir. 1978). That proof is not met by showing mere presence near contraband at the time of arrest. United States v. Bland, 653 F.2d 989 (5th Cir. 1981); United States v. Macker, 608 F.2d 223 (5th Cir. 1979).

The government's proof, when reduced to its essentials in light of the Eleventh Circuit opinion, is that the Coast Guard decided to board the THOMAS E. on the high seas. Prior to being able to board, the Coast Guard had to chase the vessel for many hours. The Coast Guard did not know who piloted the vessel, although when STUART-CABALLERO

and his two companions exited the pilothouse, the Coast Guard was of the belief that a fourth individual remained inside. When the Coast Guard succeeded in disabling the vessel by gun fire and was able to pull alongside, the odor of marijuana was detected. Marijuana was discovered in the holds of the engine room, although no marijuana or residue was found on STUART-CABALLERO, nor was Petitioner observed in any places where marijuana was found.

Proof in this case was constitutionally deficient. The flight of the THOMAS E. is not indicative of Petitioner's guilt for the very simple reason that the government did not prove who was piloting the vessel. That was the reason the trial judge did not instruct the jury as to proof of flight. See United States v. Jackson, 572 F.2d 636, 639-640 (7th Cir. 1978);

United States v. DeSimone, 600 F.2d 532, 537 (5th Cir. 1981). The odor of marijuana on board the THOMAS E. is also not proof of knowing and intentional possession. Odor and quantity of marijuana do not of themselves prove possession, particularly where there is no proof that those accused recognized the odor.

The opinion and record do not establish that STUART-CABALLERO had the authority or ability to exercise control over the contraband. There is nothing in the evidence which challenged the hypothesis that STUART-CABALLERO was a mere passenger/invitee on the THOMAS E. He was most definitely not the captain or owner of the vessel. Cf. United States v. Willis, supra (the captain of a vessel is presumed to be in control of his vessel which gives rise to an inference of knowing possession). Moreover, there was no proof

that STUART-CABALLERO was on the vessel for a length of time sufficient to warrant an inference of knowledge. E.g., United States v. McPherson, 664 F.2d 69 (5th Cir. 1981); United States v. Reyes, 595 F.2d 275 (5th Cir. 1979). This very insufficiency was the subject of judicial examination in United States v. Freeman, 660 F.2d 1030 (5th Cir. 1981). There, the Fifth Circuit upheld the conspiracy convictions of four individuals found on board the COWBOY, a vessel which contained 41,750 pounds of marijuana. The basis for the affirmance was as follows:

> Here we have (1) the same lengthy voyage (10 days); (2) the same large quantity of marijuana (41,000 pounds); and (3) the same close relationship between captain and crew inferable from the length of the voyage and the size of the vessel. Furthermore, the jury was entitled to consider

> DeWeese's inculpatory statements about the crew even though they rejected his exculpatory statements on their behalf. Based on DeWeese's testimony, the jury knew that there was, in fact, a close relationship between captain and crew. Furthermore, DeWeese made clear that the four appellants were well aware of the presence of marijuana aboard the COWBOY. In sum, the three Alfrey-DeWeese factors alone would be sufficient to establish a prima facie case of conspiracy to import. Here, the inferences to be drawn from those factors were buttressed by DeWeese's testimony.

Id. at 1035-1036 (footnote omitted). By contrast, no similar factors are present here.

The very same concerns ring true here and require clarification by this Court. Because the evidence did not exclude the reasonable hypothesis that Petitioner did not knowingly and

intentionally possess marijuana, his conviction and the affirming opinion of the Eleventh Circuit conflicts with other federal decisions. If the courts are to speak in consistent terms, this Court must provide appropriate guidance.

Another evidentiary point in need of review by this Court involves the statutory element of nationality of the THOMAS E. as a vessel of the United States. Notwithstanding the rather explicit definition of this element in 21 U.S.C. §955b(c) that a vessel of the United States means

> any vessel [1] documented under the laws of the United States, or [2] numbered as provided by the Federal Boat Safety Act of 1971, as amended, or [3] owned in whole or in part by the United States or a corporation created under the laws of the United States, or any State, Territory, District, Commonwealth or possession thereof, unless the

> vessel has been granted nationality by a foreign nation in accordance with Article 5 of the Convention on the High Seas, 1958

the appellate court refused to require strict adherence to this legislative mandate.

The only attempt by the government to comply with this definition was by evidence that the THOMAS E. was at one time registered as a United States vessel. There was a total absence of proof that the lobster boat was so registered on the day of its seizure. The case of United States v. Platenburg, 657 F.2d 797 (5th Cir. 1981), deserves consideration on this subject because it espouses a conflicting staement of law which we suggest is more appropriate to this case. That case involved a conspiracy to make false statements to a federally

insured bank. The Fifth Circuit held that because the insured status of a bank is an essential element of the offense, it is essential that the government prove that at the time of the offense the bank was insured. Such proof could not take the form of "a copy of a 1972 certificate of insurance, a certificate which antedates the charged events by seven years." Id. at 800. In the instant case, the same lack of proof was at issue. This Court cannot allow divergent results to be based on the mere distinction that a bank was involved in Platenburg, while a boat was involved herein. This conflict ought to be resolved by this Court.

CONCLUSION

For the above stated reasons, a writ of certiorari should issue to

review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

Donald I. Bierman
DONALD I. BIERMAN
Counsel of Record

BENEDICT P. KUEHNE
BENEDICT P. KUEHNE

BIERMAN, SONNETT, BEILEY,
SHOHAT & SALE, P.A.
Suite 500
200 S.E. First Street
Miami, Florida 33131
(305) 358-7477

Counsel for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30 day of December, 1982, three copies of the Petition for Writ of Certiorari were delivered by mail to the Solicitor General, Department of Justice, Washington, D.C. 20530, and to

the United States Attorney's Office, 155 South Miami Avenue, Miami, Florida 33131.

BENEDICT P. KUEHNE

BENEDICT P. KUEHNE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 80-530-Cr-SMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

VICTOR MANUEL STUART CABALLERO,

Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE came before the Court on the Defendant VICTOR MANUEL STUART CABALLERO'S Motion to Dismiss the indictment. Defendant's motion challenges the constitutionality of 21 U.S.C. § 955a(a), asserting, inter alia, that Congress lacks authority to declare criminal extraterritorial acts which have no nexus to the United States.

The Court's review of the law applicable to Defendants' constitutional challenge to this statute persuades the Court that 21 U.S.C. § 955(a) is

constitutional and that Defendants' constitutional challenge must fail. Specifically, the Court finds that Congress does have authority, pursuant to Article I, Section 8 and Article III, Section 2 of the Constitution, to enact such legislation within the statutory framework of The Comprehensive Drug Prevention and Control Act of 1970. See United States v. Baker, 609 F.2d 134 (5th Cir. 1980), and cases cited therein; see also United States v. Warren, 578 F.2d 1058 (5th Cir. 1978). The Court further notes that Defndants herein were apprehended aboard a Unitd States flag vessel. See United States v. Bowman, 260 U.S. 94 (1922). The Court finds Defendant's other arguments to be equally without merit. Accordingly, it is

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss be, and

the same hereby is, DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 6 day of January, 1981.

/s/ Sidney M. Aronovitz
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Stephen J. Bronis, Esq.
Sonia Escobio-O'Donnell, AUSA

UNITED STATES of America,
Plaintiff-Appellee,

v.

Victor Manuel STUART-CABALLERO,
Amador Ortega and Armando Arias
Diaz, Defendants-Appellants.

No. 81-5607.

United States Court of Appeals,
Eleventh Circuit.

Sept. 24, 1982.

Defendants were convicted in the United States District Court for the Southern District of Florida, Sidney M. Aronovitz, J., of possession of marijuana on American vessel with intent to distribute, and defendants appealed. The Court of Appeals held that: (1) the United States could, consistent with international law and due process, extend its criminal narcotics laws to vessels on high seas, even absent proof of intent to distribute narcotics in the United States; (2) defendants had no reasonable expectation of privacy in

areas where marijuana was found, and search and subsequent seizure were proper; (3) prosecutor's comments that "The defendants may or may not have a different version [of the case]. This is the Government's version" and "They didn't answer that question to your satisfaction * * * They didn't answer it at all" did not constitute improper comment on defendants' exercise of right not to testify; (4) evidence sufficiently showed that vessel was vessel of the United States on date in question; and (5) evidence did not merely show that defendants were present on vessel near marijuana but was sufficient to establish possession on the vessel with intent to distribute.

Affirmed.

Donald I. Bierman, Benedict P. Kuehne, Miami, Fla., for defendants-appellants.

Paul Morris, Miami, Fla., for Ortega and Diaz.

Robert J. Bondi, Asst. U.S. Atty., Miami, Fla., for plaintiff-appellee.

Appeals from the United States District Court for the Southern District of Florida.

Before VANCE and JOHNSON, Circuit Judges, and ALLGOOD*, District Judge.

PER CURIAM:

Appellants were convicted after trial by jury of one count of possession of marijuana on an American vessel with intent to distribute, in violation of 21 U.S.C. §955a and 18

* Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

U.S.C. §2. There is no merit to any of the contentions raised on appeal, and we therefore affirm.

While on patrol in international waters south of Florida on the night of October 8, 1980, a Coast Guard cutter spotted a ship on radar. The Coast Guard moved to intercept the ship and, with seamen training a large spotlight on the ship's stern, identified it as the THOMAS E, out of Norfolk, Virginia. The cutter's captain decided to board the THOMAS E, but the three crewmen on board the THOMAS E doused all lights and attempted evasive action. A high seas chase ensued, continuing until the cutter managed to disable the vessel with cannon fire nine hours later. Throughout the chase, seamen using nightscopes kept continuous surveillance of the ship, but never saw more than three people aboard. Once the THOMAS E

was disabled, a boarding crew was sent to search the ship. Before boarding, the crew could smell the strong odor of marijuana coming from the ship. The three persons on board were arrested and a general search uncovered more than 21,600 pounds of marijuana stored in the engine room and two forward cargo holds.

On appeal appellants first challenge the constitutionality of section 955a. They argue that the United States cannot, consistent with international law and due process, extend its criminal narcotics laws to vessels on the high seas absent proof of an intent to distribute the narcotics in the United States. This argument was foreclosed by recent decisions of this court. In United States v. Marino-Garcia, 679 F.2d 1373 (11th Cir. 1982); United States v. Liles, 670 F.2d 989 (11th Cir. 1982), and United States v.

Riker, 670 F.2d 987 (11th Cir. 1982), we rejected similar challenges to the constitutionality of section 955a. Appellants also contend that the statute is unconstitutional because it does not require a showing of voluntary or knowing possession of the controlled substance. The very terms of section 955a belie this contention, however, because the statute requires a showing of possession with intent to distribute. The district court properly overruled defendants' motion to dismiss the indictment.

Appellant Stuart-Caballero contests the validity of the stop, search, and seizure of the THOMAS E because the government failed to show there was probable cause that criminal activity was occurring. Assuming there was no probable cause to believe a crime was being committed, a debatable point

in light of the attempted flight, the Coast Guard has plenary authority to stop and board American vessels on the high seas. 14 U.S.C. §89(a). Such a search may be for the purposes of ascertaining compliance with safety, documentation, customs, or narcotics laws and the Coast Guard needs neither probable cause nor reasonable suspicion to board. United States v. Mazyak, 650 F.2d 788, 790 (5th Cir. 1981), cert. denied, ____ U.S. ____, 102 S.Ct. 1281, 71 L.Ed.2d 464 (1982). Once on board, the Coast Guard has the authority to search all common areas of the ship. United States v. DeWeese, 632 F.2d 1267, 1270-71 (5th Cir. 1980), cert. denied, ____ U.S. ____, 102 S.Ct. 368, 70 L.Ed.2d 188 (1981). There being no reasonable expectation of privacy in the areas where the marijuana was found, the search and subsequent seizure were

proper.

Appellants Ortega and Diaz contend that the prosecutor committed reversible error when he improperly commented on their decision not to testify. The prosecutor uttered two statements that form the basis for this contention. First, in opening argument the prosecutor said:

> The defendants may or may not have a different version [of the case]. This is the Government's version.

Later, when attacking the testimony of the one defendant who did testify, the prosecutor rhetorically asked why the witness failed to explain the possible reasons a mysterious fourth person would allow three strangers to board a boat loaded with $5.5 million worth of marijuana. The prosecutor then said:

> They didn't answer that question to your satisfaction, ladies and gentlemen. They didn't answer

it at all.

It is clear that a prosecutor may not comment on a defendant's exercise of his right not to testify at his trial. Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). In this circuit, improper prosecutorial comment may be established by showing that: (1) the prosecutor manifestly intended to comment on the defendant's silence, or (2) the character of the comment was such that a jury would naturally and necessarily construe it as a comment on the defendant's silence. United States v. Harbin, 601 F.2d 773, 777 (5th Cir.), cert. denied, 444 U.S. 954, 100 S.Ct. 433, 62 L.Ed.2d 327 (1979). Neither test was met in this case. First, appellants failed to show improper motive on the part of the government. Second, the comments, when taken in context, were mild assertions

that could not reasonably be construed as improper comment. In his comment during summation, the prosecutor was merely attacking the credibility of one witness when he carelessly used the word "they". The comment during opening argument was even less objectionable. The district court three times instructed the prosecutor to refer to "the government's version" of the evidence, so the complained of statement can only reasonably be viewed as a response to the court's orders, and not an improper comment. See id.

Appellant Stuart-Caballero argues that the government failed to prove that on the date in question the THOMAS E was a vessel of the United States. The evidence showed that at the time of appellants' arrest the vessel bore on its stern the words "THOMAS E NORFOLK VA." The evidence also included

a certified copy of its certificate of United States registry issued by the Coast Guard in Miami, Florida on May 13, 1980, less than five months from the date of appellants' arrest.

Under a comprehensive federal system of regulation of trading and fishing vessels, eligible ships that engage in trade with foreign lands are registered under a documentation procedure established in the Act of December 31, 1972., 1 Stat. 287 and now codified in 46 U.S.C. ch.2. "The purpose of a register is to declare the nationality of a vessel ... and to enable her to assert that nationality wherever found." The Mohawk, 70 U.S. (3 Wall.) 566, 571, 18 L.Ed. 67 (1866), quoted in Douglas v. Seacoast Products, Inc., 431 U.S. 265, 272-73, 97 S.Ct. 1740, 1745, 52 L.Ed.2d 304 (1977) and Anderson v. Pacific Coast Steamship Co., 225 U.S.

187, 199, 32 S.Ct. 626, 56 L.Ed. 1047 (1912). A ship so registered is a "vessel of the United States" and retains that status until the documentation is surrendered with approval of the Secretary of Transportation. Merchants National Bank v. Ward Rig No. 7, 634 F.2d 952, 955-57 (5th Cir. 1981); 46 U.S.C. §911. Registration of the THOMAS E was a temporary registration issued at a port other than its home port. The temporary status is of no present significance, however, and simply requires that its registration document be surrendered within ten days of its arrival at its home port of Norfolk, 46 C.F.R. §67.35, the only port where its permanent documents can be issued. 46 C.F.R. §67.19.

The name and home port of every documented vessel must be marked on its stern in letters of prescribed

type, color and size. 46 U.S.C. §46; 46 C.F.R. §67.13-1. At the time of appellants' arrest, the THOMAS E bore the same name and home port on its stern as on its May 13, 1980 registration certificate.

The force of such evidence is dealt with by Wigmore as follows:

> When the existence of an object, condition, quality, or tendency at a given time is in issue, the prior existence of it is in human experience some indication of its probable persistence or continuance at a later period.
>
> The degree of probability of this continuance depends on the chances of intervening circumstances having occurred to bring the existence to an end. The possibility of such circumstances will depend almost entirely on the nature of the specific thing whose existence is in issue and the particular circumstances affecting it in the case in hand. That a soap bubble was in existence half an hour ago affords no inference at all that it is in existence now; that Mt. Everest was in existence ten years ago is

> strong evidence that it exists yet; whether the fact of a tree's existence a year ago will indicate its continued existence today will vary according to the nature of the tree and the conditions of life in the region. So far, then, as the interval of time is concerned, no fixed rule can be laid down; the nature of the thing and the circumstances of the particular case must control.

2 Wigmore, Evidence §437(1) (Chadbourn rev.1979) (emphasis in original) (footnote omitted).

Stuart-Caballero misplaces reliance on United States v. Platenburg, 657 F.2d 797 (5th Cir. 1981), in which Unit A of the fifth circuit held after September 30, 1981, that a seven year old certificate was not sufficient by itself to establish FDIC coverage. Continued FDIC insurance coverage, however, depends on periodic payment of premiums. See United States v. Brown, 616 F.2d 844, 848 (5th Cir. 1980).

1980). Applying the logic of Wigmore it is apparent that a vessel registration less than five months old creates a very different probability of continuance than does an FDIC certificate that is several years old. Even so, United States v. Maner, 611 F.2d 107 (5th Cir. 1980), a case that is binding authority in this circuit, holds that a five year old certificate coupled only with evidence of a bank's continued display of copies of the certificate at the time of trial constituted sufficient proof of coverage.

The evidence before us is much stronger. We have no difficulty in concluding that the THOMAS E was proved to be a vessel of the United States.

Finally, all three appellants contend that the evidence was also insufficient to establish anything more than their mere presence near the

contraband. The evidence showed: (1) Ortega's story notwithstanding, only three persons were aboard the THOMAS E; (2) the ship had nearly eleven tons of marijuana aboard and all defendants had to be aware of it given its pervasive odor, (3) more than one person was needed to load and off-load the large quantity of marijuana on board; and (4) the attempted flight evinced guilty knowledge. More than mere presence has been established in this case. The evidence is more than sufficient to sustain the jury's verdict. See United States v. Liles, 670 F.2d at 992-93; United States v. Riker, 670 F.2d at 989; United States v. Mazyak, 650 F.2d at 790-91 & n.2.

AFFIRMED.